

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

YVETTE MUNOZ et al.,

Plaintiffs and Respondents,

v.

CITY OF UNION CITY et al.,

Defendants and Appellants.

A095846

(Alameda County
Super. Ct. No. H2046727)
ORDER MODIFYING OPINION
AND DENYING REHEARING
[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on July 23, 2004, be modified as follows:

1. On page 34, first full paragraph, the passage beginning with the words “The parties’ theories of this case,” and ending with the words “split-second decision making,” is omitted, and the remaining first two sentences of that paragraph are combined with the end of the previous paragraph (which begins on page 33), so the paragraph reads:

However, the requesting party’s right is to *nonargumentative* instructions. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572; *McMahon v. Albany Unified School Dist.* (2002) 104 Cal.App.4th 1275, 1289.) “The court should state rules of law in general terms, and avoid reciting matters of evidence. If the instruction embodies detailed recitals of fact drawn from the evidence, in such a manner as to constitute an argument to the jury in the guise of a statement of the law, it is improper. The matter may be entirely legitimate as argument by counsel, for when so used, the jury knows that it comes from an interested source and may weigh and consider it accordingly. But it is seriously objectionable to have the

same matter injected into the court's charge, which, as the jurors are informed, is binding upon them. [Citations.]" (7 Witkin, Cal. Procedure (4th ed. 1997) Trial, § 323, pp. 366-367.) Additionally, "it is error to give, and proper to refuse, instructions that unduly overemphasize issues, theories or defenses either by repetition or singling them out or making them unduly prominent although the instruction may be a legal proposition. [Citations.]" (*Fibreboard Paper Products Corp. v. East Bay Union of Machinists* (1964) 227 Cal.App.2d 675, 718.) The proposed instruction in the present case was properly viewed by the court as argumentative. As the trial court stated, the instruction "highlights one side in terms of the 20/20 hindsight."

There is no change in the judgment.

The parties' respective petitions for rehearing are denied.

Haerle, Acting P.J.